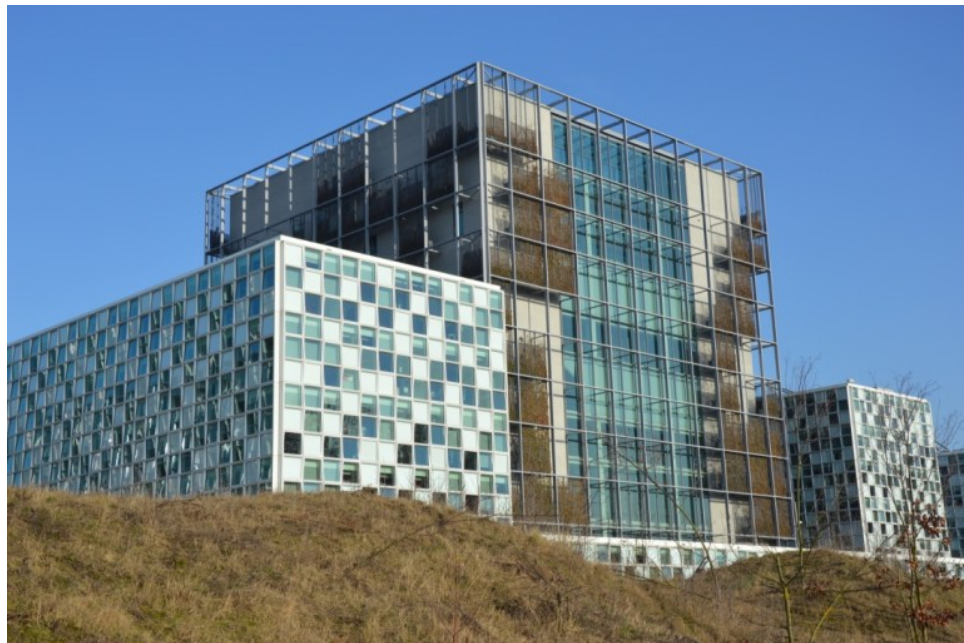


## Feminism and the International Criminal Court – still an issue?

VALÉRIE V. SUHR — 19 April, 2017



While the International Criminal Court (ICC) has always been subject to criticism and is maybe currently facing its biggest crisis with member states withdrawing, the things that are actually going quite well must not be forgotten. It is time to reexamine the ICC from a different perspective: the feminist one. After the adoption of the Rome Statute (RS) in 1998, many envisioned the Court as almost “feminist” due to its statutory emphasis on gender. Now, almost twenty years later, it’s time to consider whether this proved right. If so, can we put the ICC and its Rome Statute to the files from a feminist perspective? Or do we have to keep fighting – even to maintain the status quo?



### Feminist history being written

The ICC and its Rome Statute are often referred to as an exemplary international regime with regard to gender issues. A look at its drafting history already shows how the Rome Statute and consequently the ICC differ from other international courts: many human rights and women’s rights NGOs were involved in its drafting – united as the “Women’s

Caucus for Gender Justice”. This paid off: The result is a progressive – feminist! – statute with regard to gender. A wide range of sexual and gender-based crimes are included, both during times of war as well as in peacetime (especially in Articles 7(1)(g), 7(1)(h), 8(2)(b)(xxii), 8(2)(e)(vi)). Article 21(3) for the first time in an international criminal law treaty states that the application and interpretation of the Statute must be without any distinction based on gender, *inter alia*.

The Statute also seeks to ensure the actual prosecution of sexual and gender-based crimes through the ICC's institutional design as well as its procedural law. Among the most notable ones is the need for gender expertise throughout the various organs of the Court, including even a Gender Adviser and a Gender and Children Unit (Article 42(9)).

Because of the provisions on gender proportion (Articles 36(8)(a), 44 (2)), the ICC is also a positive example for the amount of women involved – contrary to nearly all other international courts (as Grossmann shows, at 17-24). Due to these regulations, it is already clear that in the next election this year, mostly women should be elected as judges (see here, also for a discussion why this is not absolutely sure). In addition, the chief prosecutor is a woman – who already made a difference with regard to the prosecution of sexual and gender-based crimes, as will be seen below.

While at the drafting conference many favored a broad level of protection, not everyone in Rome was d– resulting in a highly disputed definition of gender adopted in Article 7(3): “*For the purpose of this Statute, it is understood that the term ‘gender’ refers to the two sexes, male and female, within the context of society. The term ‘gender’ does not indicate any meaning different from the above.*” An obvious compromise, this definition is far from clear. But it also leaves room for maneuver: While proponents of a narrow gender view can refer to the “the two sexes,” proponents of a broader interpretation can refer to “within the context of society,” which arguably includes the social construction of gender. In this case, the Rome Statue would also criminalize persecution on the grounds of sexual orientation under Article 7(3)(h).

So, based on the Rome Statute, the hopes were understandably high for a feminist court not only in theory but also in practice. But has the Court been able to meet these expectations?

### **Reality check**

Especially from a feminist perspective, the ICC's first judgment in 2012 was a disappointment. Much of the critique concerned the Office of the Prosecutor's (OTP) to charge Thomas Dyilo Lubanga with sexual and gender-based violence, although the practice of mass rapes in the Democratic Republic of Congo was well established.

However, since then much has happened. The new chief prosecutor – Fatou Bensouda – made it clear from the very beginning that she wanted to put an emphasis on sexual and gender-based crimes. And indeed, her 2014 policy paper on sexual and gender-based crimes is quite progressive. In addition to highlighting the importance of prosecuting these crimes and offering ways to ensure this, the paper defines gender in a broad way, in accordance with insights from gender studies. Consequently, the OTP defines gender-based crimes as “those committed against persons, whether male or female, because of their sex and/or socially constructed gender roles.”

Her efforts seem to be paying off: In March 2016, the ICC issued its first conviction relating to a sexual crime in the case of *Bemba* (reviewed on this blog). Interestingly, three

female judges issued the judgment. It is an ongoing discussion whether and how a judge's gender matters to the outcome. But it is notable that the International Criminal Tribunal for Rwanda's (ICTR) groundbreaking judgment in the matter of *Akayesu* – recognizing rape as a means for committing genocide – was only possible because of questions by a female judge; sexual crimes were not included in the initial charges. Of course, this could be a mere coincidence, but it might also be an indication of how important female judges are – not only for the legitimacy of the courts, but also with regard to the resulting judgments.

Although another judgment by the ICC in 2016 – *Al Mahdi* – could be criticized for not including sexual and gender-based crimes, even though credible reports suggest these crimes occurred, the trend in the ICC's case law is promising: Currently, Ongwen is charged with the broadest range of sexual and gender-based violence so far, including many charges brought before the ICC for the first time, e.g. forced marriage and forced pregnancy. Moreover, the ICC is currently considering opening proceedings in Afghanistan for the crime of gender-based persecution as a crime against humanity under Article 7(3)(h) – for the first time ever in the history of international criminal courts and tribunals.

### What now?

So, luckily, although the start was not as smooth as hoped for, there is progress with regard to the prosecution of sexual and gender-based crimes. It seems as if the progressive Statute finally pays off. However, the “bumpy start” also shows that a feminist statute *per se* is not enough to make a court feminist – it is nothing but a good start. The positive change in case of the ICC was only possible because there was the intention to prioritize these crimes.

So is our work done here? Should we start looking for a new feminist project, maybe even regarding international courts once again? Certainly not. That there is progress in this area does not mean that everything is fine – and even worse: that it cannot change back. Feminist critique is more important than ever in the current political situation to ensure further progress and prevent regression. This is the aim of the Women's Initiatives for Gender Justice, the successor of the Women's Caucus for Gender Justice. But it is also important that scholars, practitioners and society in general engage in that task. For example, the Court is yet to adopt an understanding of the gender definition in Article 7(3) that is as progressive as the OTP's. With the opening of an investigation on gender-based persecution, it might soon have the chance to do so.

*Valérie V. Suhr is a PhD candidate and research fellow at the University of Hamburg. Her PhD thesis deals with the protection of sexual minorities through international criminal law, with a focus on the crime of persecution under the Rome Statute.*

Cite as: Valérie Suhr, “Feminism and the International Criminal Court – still an issue?”, *Völkerrechtsblog*, 19 April 2017, doi: 10.17176/20170419-083019.

ISSN 2510-2567

Tags: Feminist perspectives, ICC, International Criminal Law



---

**Related**

Thinking globally, acting globally  
31 May, 2016  
In "Discussion"

Victor's Justice, Contested  
21 December, 2016  
In "Discussion"

Thinking globally, acting  
regionally  
27 May, 2016  
In "Discussion"

---

PREVIOUS POST  
◀ It's not about "women's issues".

NEXT POST  
This is the most recent story.

---

## No Comment

Leave a reply

Logged in as ajv2016. Log out?

---

SUBMIT COMMENT

☐ Notify me of follow-up comments by email.

☐ Notify me of new posts by email.